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IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS MELISSA MURRAY, I. GLENN COHEN AND B. JESSIE HILL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who study, write, and teach about reproductive rights and justice, health law, family law, sexual orientation law, and constitutional law. This brief addresses issues and concerns brought to light by *amici*'s unique expertise and understanding of relevant legal principles. *Amici* have an interest in ensuring that this case is decided correctly, consistent with this Court's precedent, so that each and every woman in this country can rely on the Constitution's promise of liberty and equal citizenship.

Melissa Murray is a Professor of Law at the University of California, Berkeley, and Faculty Director of Berkeley Law's Center on Reproductive Rights and Justice. Her scholarship focuses on the role of law in defining the parameters of intimate life matters, including marriage, reproductive rights and justice, sexuality, and gender.

I. Glenn Cohen is a Professor of Law at Harvard Law School, and Faculty Director of the Petrie-Flom Center for Health Law Policy, Biotechnology & Bioethics. His scholarship focuses on issues at the intersection of medicine, ethics, and the law.

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1. Counsel for the parties were timely notified of *amici*'s intent to file this brief pursuant to Rule 37.2(a), and consented to the filing of this brief. The parties' consents have been filed with the Clerk of this Court. Pursuant to Rule 37.6, counsel for *amici* certifies that no counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

B. Jessie Hill is the Judge Ben C. Green Professor of Law and Associate Dean for Academic Affairs at the Case Western Reserve University School of Law. Her scholarship focuses on constitutional law, and specifically on the relationship between reproductive rights and health care law generally.

SUMMARY OF ARGUMENT

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Court affirmed a woman's constitutional right to terminate her pregnancy. That conclusion followed from the Court's recognition that the Constitution protects a woman's autonomy and dignity in making deeply personal decisions fundamentally affecting her destiny in life—in particular, her decision whether to become a parent.

Since *Casey*, the Court has confirmed the Constitution's commitment to protecting an individual's autonomy and dignity in making deeply personal decisions, particularly when such decisions implicate the individual's status as an equal citizen in the polity. For example, in *Obergefell v. Hodges*, 576 U.S. ____, 135 S. Ct. 2584 (2015), this Court invalidated state laws prohibiting same-sex marriages on the ground that such prohibitions deprived gay men and lesbians of autonomy and dignity in making personal decisions that are fundamental to the liberty and equal citizenship guaranteed by the Due Process Clause of the Fourteenth Amendment. Further, as *Obergefell* makes clear, the Constitution does not countenance state laws that demean and stigmatize an individual's personal decisions simply because others in society disapprove of those decisions. *Id.* at 2602.

The challenged provisions of Texas's House Bill 2 (H.B. 2) flout these well-settled constitutional principles. Not only do the challenged regulations impose substantial—and in many cases, insurmountable—obstacles for women seeking abortion services, they also disparage the autonomy, dignity, and equal citizenship of *all* women. Here, as in *Obergefell*, this Court should consider the indignities and inequities that the challenged regulations impose on individuals seeking to exercise their constitutional rights, as well as the regulations' demeaning and stigmatizing effect on the dignity and equality of female citizens.

In reviewing the challenged provisions of H.B. 2, this Court cannot overlook these effects. Instead, this Court must interrogate these effects—and the animating principles behind the regulations—to ensure that each woman receives the protection and respect that the Constitution guarantees.

Here, the challenged provisions of H.B. 2 present significant harms, both material and dignitary, to women seeking to exercise their right to an abortion. As such, these regulations constitute an undue burden. Further, like the abortion regulation deemed unconstitutional in *Casey* and the same-sex marriage bans invalidated in *Obergefell*, the challenged provisions of H.B. 2 undermine women's autonomy, dignity, and equality, and in so doing, violate the Constitution.

ARGUMENT

I. Recognition Of A Woman's Dignity And Autonomy Is A Necessary Prerequisite For The Liberty And Equal Citizenship That The Constitution Protects

The Fourteenth Amendment guarantees all citizens liberty and equality. These guarantees of citizenship cannot exist without recognition of the dignity afforded every member of society as an autonomous individual. For that reason, the Constitution protects the individual's right to make certain personal decisions about intimacy, marriage, and procreation. This Court has specifically recognized that a woman has the right to make her own decision about whether to have an abortion. The exercise of this right without undue hindrance from the State is essential to her dignity as an individual and her status as an equal citizen.

A. A Woman's Choices About Reproduction Are Fundamental To Her Individual Dignity, Autonomy, And Equal Citizenship

The Constitution has long protected a woman's autonomy in "matters so fundamentally affecting a person as the decision whether to bear or beget a child," and in so doing, has given due regard to her dignity as an equal citizen of this country. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing protection for an unmarried individual's decision to use contraception); *see also Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (establishing protection for the decision to use contraception within a marital relationship); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that the Constitution

protects a woman's right to decide whether or not to terminate a pregnancy). As this Court has recognized, "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), overruled in part by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Casey* reiterated these principles, confirming that a woman's decision to have an abortion is one of "the most intimate and personal choices a person may make," a decision that is "central to personal dignity and autonomy," and therefore "central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851.

A woman's reproductive autonomy is rooted in the deeply personal nature of her decisions about bearing children and expanding her family. However, the decision of "whether to bear or beget a child" has ramifications beyond the home and family. As this Court has recognized, women's ability "to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856. In this regard, a woman's ability to control her reproductive life unhindered by undue state interference not only affects her ability to proceed in society as an equal citizen, but to do so with the dignity that accompanies citizenship.

Because a woman's ability to control her reproductive decisions is inextricably linked to the full dignity of equal citizenship, this Court, in *Casey*, established that abortion regulations violate a woman's constitutional rights when they hinder, rather than enhance, her ability to decide

for herself whether to continue or end her pregnancy. *See Casey*, 505 U.S. at 877 ("[T]he means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."). As the Court explained, a State cannot "insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852. Accordingly, under *Casey*, regulations that unduly hinder a woman's right to choose an abortion are unconstitutional when they deprive her of the opportunity to take responsibility for a decision that will fundamentally affect her life, and when they undermine her dignity and compromise her status as an equal citizen.

This Court's invalidation of a spousal notification requirement in *Casey* is instructive on this point. There, the Court struck down the challenged regulation on the ground that it reflected a long-discredited view of women as subordinate to, and under the control of, their husbands. *See Casey*, 505 U.S. at 894–95. Recognizing that such a view of women was "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution," this Court invalidated the provision not only because it impeded abortion access for some women, but also for the separate and independent reason that it violated the Constitution's promise to protect the rights and dignity of all women as equal citizens. *Id.* at 898.

Further, the Court's rejection of the spousal notification provision at issue in *Casey* makes clear that, in

interrogating the constitutionality of abortion regulations, this Court does not merely count the number of women affected by a particular regulation and the severity of the material harm it causes, but instead must consider the regulation's impact on the dignity and status of all women. For example, although the spousal notification provision challenged in *Casey* affected only a small percentage of women in Pennsylvania, this Court nonetheless held that "[t]he analysis does not end with the [small percentage] of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Id.* at 894. On this account, a law that demeans *some* women seeking an abortion clearly violates those women's rights. However, such a law is also constitutionally infirm because it violates *every* woman's right to be afforded dignity and respect as an equal citizen.

B. Relying On Its Precedents Regarding Reproductive Decisionmaking, This Court Has Recognized That The Constitution Protects And Respects Intimate Decisions Because They Are Central To An Individual's Dignity And Equal Citizenship

The Court's recent decisions concerning the relationship rights of gay men and women are rooted in its prior reproductive decisionmaking precedents. These recent cases confirm the Constitution's commitment to protecting an individual's right to make decisions regarding intimacy, marriage, and childbearing because such decisions are central to individual dignity and equal citizenship. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (establishing the right to choose intimate

partners); *United States v. Windsor*, 570 U.S. ____, 133 S Ct. 2675, 2695–96 (2013) (holding that the federal government cannot define marriage to exclude same-sex relationships); and *Obergefell*, 135 S. Ct. at 2604–05 (establishing an individual's right to choose whom to marry). For example, in *Lawrence v. Texas*, the Court relied upon *Roe v. Wade*'s recognition of a woman's right "to make certain fundamental decisions affecting her destiny" to confirm "that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Lawrence*, 539 U.S. at 565; *see also id.* at 573–74 ("The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

Most recently, in extending the right to marry to same-sex couples, this Court made clear that "[l]ike choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make." *Obergefell*, 135 S. Ct. at 2599. Because these "personal choices [are] central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this Court confirmed that they were included among the "fundamental liberties protected by [the Fourteenth Amendment's Due Process] Clause." *Id.* at 2597–98 (citations omitted).

These most recent cases leave no room for doubt that the Constitution protects certain personal decisions because they are essential to individual dignity, and therefore

essential to individual liberty and equal citizenship. Laws that impede, stigmatize, or demean these personal decisions impair the dignity and autonomy of individuals, thereby depriving them of their constitutional rights as equal citizens. As this Court explained in *Lawrence*, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." *Lawrence*, 539 U.S. at 575. On this account, the *Lawrence* Court held that a law that imposed upon the liberty and autonomy of gay men and women also impaired their opportunities to live as equal citizens within the polity. *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

In the same vein, this Court, in *United States v. Windsor*, overturned Section 3 of the Defense of Marriage Act because it "undermine[d] both the public and private significance of state-sanctioned same-sex marriages," and in so doing, consigned same-sex couples to second-class status. *Windsor*, 133 S. Ct. at 2694. Likewise, in *Obergefell v. Hodges*, this Court held state laws banning same-sex marriage unconstitutional not only because they deprived LGBT persons of the right to marry, but also because they had the unconstitutional "effect of teaching that gays and lesbians are unequal in important respects." *Obergefell*, 135 S. Ct. at 2601–02. As this Court cautioned, laws that impair the dignity and equality of citizens are utterly inconsistent with the Fourteenth Amendment's guarantees of liberty and equality. *Id.* at 2602. (Limiting "marriage to opposite-sex couples" is thus "inconsisten[t]

with the central meaning of the fundamental right to marry," and "impose[s] stigma and injury of the kind prohibited by our basic charter.").

Although these most recent cases focus on the rights of gay men and women, their logic extends to—and indeed, is rooted in—this Court's jurisprudence on the reproductive rights of women, including a woman's right to obtain an abortion. On this account, *Lawrence*, *Windsor*, and *Obergefell* confirm the principle set forth in the Court's reproductive decisionmaking cases, which establish that the Constitution protects citizens from unwarranted restrictions on personal choices that are fundamental to human dignity and equality. However, these recent cases go further to insist that the State cannot impose regulations that stigmatize or demean these personal decisions. Instead, the Constitution demands that the State treat these decisions with equal respect.

II. The Challenged Regulations Unduly Impose Both Material And Dignitary Burdens On A Woman's Right To An Abortion In Violation Of The Constitution

The challenged requirements of H.B. 2 violate the Constitution because they impose undue burdens on women's access to abortion services. These undue impositions include the many burdens and costs associated with the long-distance travel that Texas women must now undertake in order to avail themselves of their constitutional rights. However, separate and apart from these material effects on abortion access, the challenged provisions also pose an undue burden in violation of the Constitution because they deprive women of dignity and autonomy while conveying the State's strong disapproval of their intimate decisions.

A. The Challenged Regulations Are Unconstitutional Because They Require Women To Travel Excessive Distances In Order To Access Abortion Services

The abortion regulations at issue here compel women to travel long distances in order to access abortion services. In so doing, the challenged regulations violate the Constitution by imposing undue financial and material burdens on the exercise of a protected right.

1. The Challenged Regulations Materially Impair A Woman's Ability To Access Abortion Services Without Offering Any Offsetting Benefits

As the district court found, and the Fifth Circuit acknowledged, the admitting privileges requirement in H.B. 2 will mean that approximately 400,000 more women will be required to travel in excess of 150 miles to obtain an abortion. Similarly, the ambulatory surgical center ("ASC") requirement will result in an increase of approximately 900,000 women who must travel 150 miles or more to obtain an abortion. *See Whole Women's Health v. Cole*, 790 F.3d 563, 588 (5th Cir. 2015). The effect of the challenged requirements is thus to consign women to venture far from home when seeking what, in most cases is, a routine and safe medical procedure. In so doing, the challenged regulations do not offer any health or medical benefit that would offset the demonstrable burdens that they impose.

2. In Requiring Women To Travel Long Distances To Obtain An Abortion, The Challenged Regulations Impose Undue Financial Burdens That Are Especially Onerous For Women Of Limited Means

In requiring women to travel long distances to access abortion services, the challenged regulations impose considerable financial burdens. These burdens cannot be overstated. The challenged provisions will require women to spend considerable sums to secure reliable transportation to and from a compliant abortion provider or facility. Because the challenged provisions precipitate long-distance travel, they may also require women to secure out-of-town accommodations before and after the abortion is performed.

These costs are considerable—and they erect substantial barriers to abortion services, especially for women of limited means. Even those women who are able to access reliable transportation may be unable to secure out-of-town accommodations necessary to obtain an abortion from an approved abortion facility. In these cases, although a woman may be able to obtain an abortion, she may be forced to choose among spending limited funds on out-of-town lodging, forgoing rest and recuperation in order to return home immediately after the procedure, and risking the danger and discomfort of sleeping in her vehicle in parking lots or by the side of the road. A woman will recognize this discomfort and danger for what it is: state-imposed punishment for her decision to discontinue her pregnancy.

In this regard, the challenged provisions of H.B. 2 will not merely make access to abortion more difficult: for some women of limited means, they will be an absolute bar to abortion access. These women can ill afford the transportation costs, lost time at work, or childcare expenses that will be required to travel long distances in search of a compliant abortion provider or facility. These women may end up continuing with their pregnancies, resulting in children that are the product of H.B. 2's significant obstacles, rather than careful and reasoned judgment.

B. In Addition To These Material Effects, The Challenged Regulations Impose Dignitary Burdens That Independently Constitute Undue Burdens On Abortion Access

By forcing women to travel great distances to seek a standard medical procedure, the challenged regulations impair the dignity and citizenship status of women. Many women will not be able to travel such long distances without exposing their decision to their employers, families or intimate partners. A 300-mile roundtrip requires time and transportation. Some women will have to explain to an employer why they need time off work. Others will have to explain or justify to their husbands or partners why they will be gone overnight; why they need the family car; or why they took money out of a joint bank account to pay for transportation and a hotel room. In revealing their decisions, these women risk stigmatization or other adverse consequences at work. They also face such risks at home where their husbands or partners may try to prevent them from having an abortion through coercive entreaties or physical violence.

In this regard, the challenged provisions of H.B. 2 pose many of the same dignitary harms as the spousal notification and spousal consent requirements invalidated in *Casey* and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, this Court rejected a Missouri regulation that required a woman seeing an abortion to secure the prior written consent of her spouse. Though the Court recognized the importance of the marital relationship and "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy," it nonetheless held that a State "may not constitutionally require the consent of the spouse as a condition for abortion." *Danforth*, 428 U.S. at 69. Likewise, in *Casey*, this Court rejected a regulation that required a woman seeking an abortion to notify her spouse in advance of the procedure. Of particular concern to the *Casey* Court was the possibility that a spouse, "through physical force or psychological pressure or economic coercion," would prevent a woman from obtaining an abortion, placing women who "reasonably fear the consequences of notifying their husbands that they are pregnant . . in the gravest danger." *Casey*, 506 U.S. at 897–98.

Similar concerns attend the challenged provisions of H.B. 2. Like the spousal consent and the spousal notification provisions found constitutionally infirm in *Danforth* and *Casey*, the challenged provisions may prompt women seeking abortions to reveal their plans to their spouses and partners against their will, risking exposure to intimate violence and coercion. Texas cannot circumvent this Court's precedents by enacting a law that achieves the same impermissible effects under a different guise. The challenged provisions of H.B. 2 may

endanger women in coercive or abusive relationships by exposing their reproductive decisions, compromising their decisional autonomy and individual dignity.

1. By Specifically Targeting Abortion, A Procedure Available Only To Women, The Challenged Regulations Compromise Women's Dignity And Undermine Their Status As Equal Citizens

The challenged requirements are uniquely and exclusively applicable to women because of the procedure they seek to regulate. Texas's laws do not even contemplate requirements that make such long distance travel necessary for comparable medical procedures, or medical procedures that pertain only to men. While individuals may elect to travel in order to seek medical care from certain providers, or to access procedures that are untested, complex, or infrequently performed, those burdens fall equally on both sexes, and do not target a procedure that only women will have reason to seek. Moreover, in such situations, the individual's decision to travel great distances to obtain medical care is the product of his or her own judgment and deliberation—not the product of state-imposed regulations that make routine medical care unavailable at home.

In regulating abortion services specifically, the challenged provisions announce that women seeking abortion services are unworthy and unequal in the eyes of the law. The challenged regulations impose requirements on abortion facilities that stand in stark contrast to Texas's general requirements for medical facilities, including those that provide more physically invasive and

potentially dangerous services. Although Texas attempts to justify the challenged regulations as measures that promote women's health, by singling abortion out for standards that are applied to no equivalent procedure, the challenged regulations infantilize women, signaling that they are incapable of making vital decisions about their own health care when it comes to seeking an abortion. *See* Ushma D. Upadhyay, Sheila Desai, Vera Zlidar, Tracey A. Weitz, Daniel Grossman, Patricia Anderson & Diana Taylor, *Incidence of Emergency Department Visits and Complications After Abortions*, Obstetrics & Gynecology, Vol. 125, No. 1, pp. 175–83 (Jan. 2015), http://journals.lww.com/greenjournal/Citation/2015/01000/Incidence_of_Emergency_Department_Visits_and.29.aspx (concluding that less than one percent of all abortions resulted in emergency department visits for abortion-related complications or major abortion-related complications).

Critically, H.B. 2's challenged provisions have no analogue in medical contexts outside of abortion. Other health care providers—even those performing surgery at ambulatory surgical centers (ASCs)—are not required to have admitting privileges at a hospital, as H.B. 2 requires of abortion providers. Nor does Texas single out any other procedure to be performed at a facility satisfying the ASC requirements—not even procedures requiring general anesthesia. If the challenged provisions of H.B. 2 were necessary to promote a patient's health during certain types of medical procedures, one would expect to see those requirements applied evenly to other similar procedures as well. Instead, tellingly, abortion stands alone.

Before the challenged regulations went into effect, Texas women could make their own decisions about

whether to have an abortion at an ASC or at an outpatient clinic—the same decision available to those seeking similar types of medical procedures in Texas today. In this regard, Texas women were able to decide for themselves the type of facility that was most appropriate to their circumstances. Their decisions were not compelled by the State.

Today, the challenged regulations divest women of the ability to make this decision and instead consign them to the limited options that the State chooses to make available. In this regard, the challenged regulations do not enhance women's health but merely stymie their ability to make critical decisions about their health care and the trajectory of their lives. As such, the challenged regulations flout this Court's requirement in *Casey* that "the means chosen by the State . . . must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877.

Critically, the fact that abortion services alone are targeted for this kind of regulation sends a strong message to women about the State's position on their decision to seek an abortion. Despite Texas's weak claims that these regulations are intended to promote and protect women's health, women will understand that these regulations are intended to restrict their options and disparage their decisions.

Women will certainly recognize the paternalism that undergirds the challenged regulations and its health-protective rationale. Although Texas insists that it aims to "provide the highest quality health care to women," in

limiting women's choices and disparaging their decisions, the challenged regulations smack of the "romantic paternalism" that has often justified the unequal treatment of women and their choices. *See Frontiero v. Richardson*, 411 U.S. 677, 684, (1973) (recognizing that sex discrimination was historically "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage"). Such paternalism is utterly inconsistent with this Court's constitutional jurisprudence, which has recognized women's equal status as citizens, as well as each woman's liberty to select her own path and destiny. *See United States v. Virginia*, 518 U.S. 515, 550 (1996) (explaining that "generalizations about 'the way women are,' . . no longer justify denying opportunity to women").

2. The Challenged Regulations Also Compromise And Undermine Women's Dignity And Stature As Equal Citizens By Impermissibly Rendering Them Reproductive Refugees

The fact that women must flee to other jurisdictions in order to exercise a constitutionally-protected right highlights the degree to which the challenged regulations render women reproductive refugees who have been stripped of their dignity and equality as citizens.

In producing this class of reproductive refugees, Texas makes clear the illogic of H.B. 2's purported rationale. According to Texas, the challenged requirements are necessary to ensure that abortion access is safe for Texas women. Yet, Texas has also argued that, even though these provisions sharply limit abortion access, they do not

pose an undue burden on the right to choose an abortion because Texas women may seek abortions in other states that do not impose similar restrictions. Given Texas's purported interest in protecting women's health, this is a puzzling defense. Essentially, the law's effect will simply be to drive more women to abortion facilities that do not comply with the very regulations Texas claims are intended to ensure high quality medical care for women seeking abortions. Put differently, Texas argues that H.B. 2 is constitutionally permissible because less regulated—and by Texas's logic, less safe—abortion services are available beyond its borders.

This illogical argument only underscores the dignitary injuries that the challenged provisions impose on women. In the name of "protecting" women, Texas forces them to suffer the indignity and expense of out-of-state travel to obtain the same services from the same types of facilities that Texas has effectively prohibited within its own borders.

No authority supports the notion that women must be required to exile themselves from their home states in order to exercise a constitutional right. Nor does the fact that some women may travel to neighboring jurisdictions to get an abortion remedy the regulations' constitutional infirmities or their harmful effects on women's equality and dignity. As this Court has consistently held, the fact that abortion is legal elsewhere does not remedy the constitutional injuries wrought by another jurisdiction's abortion restrictions. To be sure, prior to this Court's decisions in *Roe v. Wade* and *Doe v. Bolton*, a handful of states had legalized abortion, and women could travel to these few jurisdictions to avoid the criminal prohibitions of

their home states. *See* Heather D. Boonstra, Rachel Benson Gold, Cory L. Richards & Lawrence B. Finer, *Abortion in Women's Lives*, Guttmacher Institute, 12 (Dec. 29, 2015), https://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf ("[F]our states, including New York, had repealed their antiabortion laws completely" before *Roe*.). But, as this Court made clear in *Roe* and *Doe*, the existence of these safe havens did not vitiate the Constitution's force in requiring other states to honor women's right to choose.

Casey confirmed the correctness of that approach. There, in reviewing the challenged provisions of Pennsylvania's Abortion Control Act, this Court's undue burden analysis did not consider whether women were less burdened by Pennsylvania's regulations because abortions might be more readily available in neighboring jurisdictions. Instead, the Court insisted that each State honor the Constitution's guarantee of liberty and equality for all citizens.

This Court has confirmed this principle in other fundamental rights contexts. For example, in *Zablocki v. Redhail*, this Court held a Wisconsin law to be an impermissible burden on the right to marry, even though those affected by the law could marry in another jurisdiction. *See Zablocki v. Redhail*, 434 U.S. 374, 409–10 (1978) (noting that plaintiff challenging constitutionality of Wisconsin statute had successfully married in Illinois) (Rehnquist, J., dissenting). More recently, in *Obergefell v. Hodges*, this Court concluded that the fact that same-sex marriages were permitted in some states was insufficient to obviate another state's constitutional violation in refusing to do permit them.

Further, when Texas withdraws the conditions in which women may exercise their constitutionally-protected right, it places the financial and legal burden of honoring those rights on the shoulders of its sister states. This not only deprives Texas women of their dignity and autonomy as citizens, it also requires other states to assume Texas's responsibility to treat women as equal citizens under the law.

The challenged provisions usurp woman's reproductive autonomy and render those women who seek to exercise their constitutional rights reproductive refugees. In this way, H.B. 2's challenged regulations impose dignitary costs no individual should have to suffer in pursuit of what the Constitution promises as a matter of right.

CONCLUSION

The challenged provisions of H.B. 2 impermissibly impose on a woman's right to choose an abortion. By requiring women to travel great distances—in many cases, to other jurisdictions—in order to seek abortion services, the law creates a class of reproductive refugees who must go to excessive lengths to exercise their constitutionally-protected rights. In so doing, the challenged provisions not only place a substantial obstacle in the paths of those seeking abortion services; it does so in a manner that severely compromises the dignity and equality of women as citizens.

In cases such as *Casey*, *Lawrence*, *Windsor*, and *Obergefell*, this Court has made clear that the Constitution does not permit such deprivations of individual dignity and equal citizenship. For these reasons, *amici* respectfully request that the Court hold the challenged regulations unconstitutional.

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